

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
H.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Saint Louis, MO, Employer)
_____)

Docket No. 21-1137
Issued: January 26, 2023

Appearances:

*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On July 22, 2021 appellant, through counsel, filed a timely appeal from a June 28, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 26, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 14, 2017 appellant, then a 59-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he developed right carpal tunnel syndrome and right cubital tunnel syndrome as a result of constant lifting and carrying of packages weighing up to 10 pounds, pushing and pulling tubs of mail, and sorting mail for 10 to 12 hours per day, six days per week, while in the performance of duty. He noted that he first became aware of his claimed condition, and its relationship to factors of his federal employment on January 5, 2015. On the reverse side of the claim form the employing establishment indicated that appellant was last exposed to the factors alleged to have caused his condition on August 14, 2017.

In a report dated March 10, 2017, Dr. Siddharth Kaul, a Board-certified neurologist, noted that an electromyogram/nerve conduction velocity (EMG/NCV) study showed moderate-to-severe sensory demyelinating-type neuropathy of the median nerve at the wrist and chronic denervation patterns in the abductor pollicis brevis consistent with median neuropathy. He found that the findings were significant for the presence of right-sided carpal tunnel syndrome.

In a report dated March 20, 2017, Dr. Fallon Maylock, an orthopedic surgeon, examined appellant and diagnosed carpal tunnel syndrome of the right wrist and right cubital tunnel syndrome.

In a report dated June 22, 2017, Dr. Maylock opined that appellant's employment duties were responsible for his right carpal tunnel syndrome, and that his condition required surgery. He noted that he had worked in a physical job for 40 years that required repetitive lifting, pushing, pulling, and heavy physical activity.

By decision dated January 26, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the events surrounding the claimed condition occurred as he described.

On February 16, 2018 appellant requested reconsideration of the January 26, 2018 decision and submitted additional evidence in support of his claim, including another copy of Dr. Maylock's June 22, 2017 report and his own narrative statement dated February 2, 2018.

³ Docket No. 18-1660 (issued March 14, 2019); Docket No. 20-1658 (issued April 15, 2021).

By decision dated May 16, 2018, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of its January 26, 2018 decision.

On September 19, 2018 appellant filed a timely appeal to the Board from OWCP's May 16, 2018 decision.

By decision dated March 14, 2019, the Board affirmed OWCP's May 16, 2018 decision, finding that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

OWCP subsequently received additional medical evidence. In a July 3, 2018 narrative report, Dr. Bruce Schlafly, an orthopedic hand surgeon, noted a history of pain, numbness, and tingling in the right hand since 2015, which had worsened in late 2016. He related that appellant had worked as a mail carrier for 36 years, and that his job duties included repetitive grasping of bundles of mail, sorting mail for 2.5 hours per day, and walking, driving and delivering mail for 5 hours per day. Dr. Schlafly reviewed the March 10, 2017 EMG/NCV study and performed a physical examination, which revealed atrophy of the thenar muscles of the right hand, positive Tinel's sign at the median nerve, and positive Phalen's test at the right wrist. He diagnosed severe right carpal tunnel syndrome and opined that the condition was caused by appellant's employment duties since 2016.

On August 21, 2020 appellant, through counsel, again requested reconsideration.

By decision dated August 28, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

By decision dated April 15, 2021, the Board affirmed OWCP's August 28, 2020 decision in part, finding that OWCP properly determined that appellant's August 21, 2020 request for reconsideration was untimely filed. The Board, however, also set aside OWCP's August 28, 2020 decision in part, finding that OWCP did not make sufficient findings regarding the evidence submitted in support of the reconsideration request. The case was remanded for an appropriate decision on appellant's untimely reconsideration request, including a description of the evidence submitted on reconsideration and detailed reasons for accepting or rejecting the reconsideration request.

By decision dated June 28, 2021, OWCP again denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as is indicated by the "received date" in the Integrated Federal

⁴ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁵ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁶

OWCP may not deny a request for reconsideration solely because it was untimely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.⁷ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.⁸

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁹ Evidence that does not raise a substantial question as to the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹³

OWCP's procedures further provide that the term clear evidence of error is intended to represent a difficult standard.¹⁴ The claimant must present evidence that on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report that, if

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁶ *G.L.*, Docket No. 18-0852 (issued January 14, 2020).

⁷ 20 C.F.R. § 10.607(b); *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *Supra* note 2; *supra* note 5 at Chapter 2.1602.5(a) (February 2016).

⁹ 20 C.F.R. § 10.607(b); *B.W.*, Docket No. 19-0626 (issued March 4, 2020); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹⁰ *S.W.*, Docket No. 18-0126 (issued May 14, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *See G.B.*, Docket No. 19-1762 (issued March 10, 2020); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹² *Id.*

¹³ *Id.*

¹⁴ *R.K.*, Docket No. 19-1474 (issued March 3, 2020).

submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Preliminarily, the Board notes that in its April 15, 2021 decision the Board found that OWCP properly determined that appellant's August 21, 2020 request for reconsideration was untimely filed. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹⁶ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying the claim.¹⁷

In support of his untimely request for reconsideration, appellant submitted the July 3, 2018 report of Dr. Schlafly. The underlying issue in this matter, however, is whether he met his burden of proof to establish that the events surrounding the claimed condition occurred as he described. As this issue is factual in nature, the Board finds that the evidence submitted in support of reconsideration does not raise a substantial question as to the correctness of OWCP's January 26, 2018 decision.

The term clear evidence of error is intended to represent a difficult standard. It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor. The Board finds that the evidence submitted on reconsideration does not show on its face that OWCP committed error when, in its January 26, 2018 decision. Appellant has not otherwise submitted evidence sufficient to raise a substantial question as to the correctness of OWCP's January 26, 2018 decision. Accordingly, the Board finds that OWCP properly denied his reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁵ *W.B.*, Docket No. 20-1197 (issued February 3, 2021); *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

¹⁶ *S.M.*, Docket No. 18-1195 (issued January 6, 2020); *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

¹⁷ 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board